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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 141

SHIPPERS' CAR SUPPLY COMMITTEE, an Oregon Corporation,

Appellant,

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,

Appellees,

and

SOUTHERN PACIFIC COMPANY,

Intervening Defendant Appellee.

APPELLANT'S BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM THE STATE OF OREGON AMICUS CURIAE

On Appeal from the United States District Court for the District of Oregon

THE STATE OF OREGON
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TABLE OF CONTENTS

	Page
The Question Presented is Substantial	2
Contents of the Commission's Report	3
The Issue of Discrimination	4
The Law	5
The Commission's Detailed Findings Showing Discrimination	6
Analysis of Findings Relied upon by Appellees to Sustain the Commission's Ultimate Findings and Conclusions Relating to Discrimination	7
The Basis for the Commission's Conclusion as Stated by the Commission	11
Commission's Findings of Fact Based on Evidence Beyond the Record	12
The Controversy is not Moot	13
Conclusion	18

TABLE OF AUTHORITIES

Cases:	Page
Federal Trade Com. v. Goodyear Tire & R. Co., 304 U.S. 257	15
Ford Motor Co. v. U. S., 335 U.S. 303	15
Interstate Commerce Comm. v. Louisville & N.R. Co., 227 U.S. 88, 91	11
Midland Valley R. Co. v. Barclay, 276 U.S. 482	6, 7
Panama Refining Co. v. Ryan, 293 U.S. 388	15
Pensnylvania R. Co. v. Sonman S.C. Co., 242 U.S. 120, 127	10
Southern P. Terminal Co. v. Interstate Commerce Comm., 219 U.S. 498	15
United States v. Berwind-White Coal Mining Co., 274 U.S. 564, 583	12
United States v. Trans-Missouri Freight Assoc., 166 U.S. 290, 308	15
Walling v. Haile Gold Mines, (C.C.A. 4, 1943) 136 F2d 102, 105	15
Walling v. Reuter, Inc., 321 U.S. 671	15
Yarnell v. Hillsboro Packing Co., (C.C.A. 5, 1934) 70 F2d 435, 438	15
Statutes:	
40 U.S.C. Sec. 3(1)	5

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A motion to affirm has been filed on behalf of the Interstate Commerce Commission and United States. A separate and similar motion has been filed by Southern Pacific Company. In effect, these motions contend that certain findings referred to or quoted from the Order of the Commission are sufficient to sustain the Commission's ultimate conclusions.

The Question Presented Is Substantial

Appellants could probably have forestalled the motions by following the usual procedure of bringing up the entire transcript of evidence. Indeed, it was not without some rather agonized inner-searchings that appellant elected to bring the matter to this Court in simple form, based solely on the inadequacy of the Commission's report to support its conclusions.

In this instance, appellant has chosen the simplest possible approach to this Court. That the question is limited, however, by no means portends that its answer lacks substance and importance.

As shown by the Commission's report, this proceeding before the Commission was one of far greater scope than the usual discrimination case. An appendix to the original complaint filed with the Commission shows some 93 business firms as members of the appellant Shippers' Car Supply Committee. The proceeding developed into a general investigation, with intervention by the Oregon Public Utility Commissioner. Substantial evidence was introduced by that public agency (p. 17, Motion to Affirm of the Commission and United States). [1]

We have elected to present this appeal in limited form. We are satisfied with that choice. Our only concern is that we not be denied our day in court because of our departure from the more customary (and more complicated) appellate tactics. The simplicity of the approach should not militate against the importance and gravity of the questions presented.

The issue is, in fact, a limited one, and the nature

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[1] For purposes of brevity and consistency in this brief, our page references to the Commission's Report will be to the pagination in the appendix to the motion to affirm filed on behalf of the United States and Interstate Commerce Commission. The report of the Commission is likewise appended to the motion filed on behalf of Southern Pacific Company.

of the motions to affirm tempt one to forget that this is purely preliminary and not a matter upon which appellant is expected to file a complete brief upon the merits.

Contents of the Commission's Report

The Report of the Commission, after brief introductory recitals, proceeds through some 11 pages devoted almost wholly to recitals and subsidiary findings indicating that appellant presented a strong and convincing case before the Commission. (pp. 12 through 22). After some 8 pages (23 to 30) devoted to the damage claim of Wren, (not involved in this appeal) the Order concludes with 6 pages (31 to 36) from which the Commission and Southern Pacific in their motions seek to draw support for the conclusions reached by the Commission.

The language relied upon is quoted in some detail at pages 6 to 8 of the Commission's motion. For purposes of brevity we adopt the summary used by Southern Pacific at pages 12 and 13 of that company's Motion to Affirm, with some capsulizing so as to conveniently outline the findings of fact upon which the attacked conclusions of the Commission must rest:

1. The Oregon car shortages were regional manifestations of car shortages national in scope which occurred at approximately the same periods. (p. 12, Southern Pacific Motion).
2. Oregon shortages were largely the result of unprecedented expansion of the lumber industry at a time the railroads were striving to improve transportation facilities after years of depression and war. (p. 13, Southern Pacific Motion).
3. Southern Pacific Company surpassed the performance of the nation's railroads as a whole in augmenting equipment and improving efficiency. (p. 13).

4. Southern Pacific was handicapped in its efforts to alleviate the Western Oregon car shortages because Oregon is a deficit state, where the demand for empty cars substantially exceeds the number of loaded cars moved into the state and made empty there. Cars have to be brought to Oregon from great distances. (p. 13).

5. Southern Pacific was hindered in meeting Oregon's demands by car service orders (of the Association of American Railroads) requiring it to turn over large quantities of empty cars to connecting lines. (p. 13).

The Issue of Discrimination

Clearly it would not be proper nor feasible for appellants to argue this matter on the merits at this time. We have raised in our opening statement of jurisdiction what we sincerely feel are substantial questions concerning the validity of the order involved. It is no answer to these points to urge that the Commission's order is presumptively valid and that its findings of fact are presumptively sound, propositions with which no one disagrees. Our basic point is that having made findings of fact which presumptively are valid, the Commission stated ultimate findings and conclusions contrary thereto and wholly arbitrary and entered its order accordingly. This defect in the order may most clearly be illustrated by discussion of the findings and conclusions relating to the issue of discrimination. At page 8 of our opening statement of jurisdiction, this issue was stated as follows:

"3. Causing undue and unreasonable prejudice and disadvantage to complainant's members by failure to provide car service to them in the same proportion to actual requirements as were provided to other

shippers on its lines in Oregon and elsewhere, contrary to section 3(1) of the act.

4. Causing undue and unreasonable prejudice and disadvantage to shippers generally on its lines in Oregon and giving undue and unreasonable preference and advantage to other shippers on its lines in other states, in violation of Section 3(1) of the act."

We do not intend, of course, in discussing this question, to waive any part of the presentation contained in our opening statement of jurisdiction. Our purpose is to illustrate that feature of the case which may with the greatest brevity and clarity be used to illustrate the defects in the order which we feel justify this Court in noting probable jurisdiction.

The Law

The applicable statute upon which the above allegations of discrimination were rested is 49 U.S.C. Sec. 3(1) which provides:

"It shall be unlawful for any common carrier subject to the provisions of this Part, to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; provided, however, that this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

The Commission's Detailed Findings Showing Discrimination

The pivotal findings on the discrimination question appear at page 21 of the order:

> "Shortage in adequate car ownership by the defendant under fair and equitable distribution, would affect its ability to serve shippers over the entire system. A witness for the Oregon Commissioner testified that the car shortage on the Portland division was acute from the week ended May 15 until the second week of November 1950. Weekly shortages after that first week exceeded 1000 cars, averaging 2,864 cars during July, and reaching a high of 5,562 in late August. Somewhat comparable figures were presented by the General Superintendent of Transportation for the defendant. They show that an average shortage of some 1,352 cars existed on the Portland division. These data indicate that a severe shortage of cars was experienced on the Portland division some weeks before any shortage was indicated for the rest of the system. No over-all system shortage is shown until the week ended June 17, 1950. The system shortage for that week appears as 831 cars, whereas the shortage for the Portland division is given as 1,497 cars. According to the complainant, the weekly average shortage on the Portland division was from two to three times that shown for the system. For example, for the weeks ended July 15, 22, and 29 a net system surplus of 303,421, and 95 cars appears, whereas according to the complainant in the case there was a shortage on the Portland division of 2,091, 2,793 and 2,284 cars, respectively." (p. 21, Appendix to Commission's Motion).

Note that the Commission has found that comparable figures were presented by Southern Pacific itself. This is more than mere comment on the evidence. And this, if the Court please, was in 1950. This Oregon situation did not result from a new and surprising demand (*Mid-*

land Valley R. Co. v. Barclay, 276 U.S. 482) but after strenuous objections and protests from Oregon shippers beginning in 1946, including contacts with the Association of American Railroads and Interstate Commerce Commission. (p. 13, Appendix). The factual situation quoted above from the Commission's Report was the situation during the *fifth* year of the recurrent car shortage. The Oregon branch of Southern Pacific not only had a shortage a month before the Southern Pacific system showed an over-all shortage, but whenever an over-all system car shortage did appear in the figures, the system figure was only a fraction of the Oregon shortage. The average Oregon shortage of cars for the whole period of 1950 was two to three times the Southern Pacific system shortage—which means that with Oregon excluded, the situation for Southern Pacific was one of net surplus.

Thus, for the week of June 17, 1950, the figures were:

Car shortage, Southern Pacific system—831 cars
Shortage, Southern Pacific in Oregon—1,497 cars
Difference, net system surplus of cars, Oregon excluded—666 cars.

A month later, in the middle of July, the disparity was even worse. While this situation existed, some shippers trucked lumber from great distances, into Portland where cars were available (p. 16, Appendix) or, by preference or necessity, other shippers went into Washington and obtained so-called "Stop" cars which were partially loaded in Washington and then routed through Oregon to complete loading. (p. 14, Appendix).

Analysis of Findings Relied upon by Appellees to Sustain the Commission's Ultimate Findings and Conclusions Relating to Discrimination

As we have suggested, the primary thrust of our argument is that the ultimate findings and conclusions en-

tered by the Commission are arbitrary and capricious in that they are inconsistent with the underlying findings and recitals contained in the order.

Southern Pacific, as above noted, has outlined five findings which it suggests support the ultimate determinations of the Commission that, among other things, no unjust discrimination was in fact being practiced as alleged in the complaint. Let us test the findings suggested to determine whether substantial question as to their validity exists sufficient to justify this Court in noting probable jurisdiction herein.

Finding No. 1 states in substance that a national shortage of cars existed during the relevant period of time and that the shortages in Oregon were regional manifestations of a national situation. The defects in this finding are patent. There was no similarity in the pattern of the national car shortage and that on Southern Pacific's Oregon operations. As far as Southern Pacific was concerned, it had a shortage on its Oregon operations and a surplus elsewhere. There is, moreover, no legally sufficient causal relationship between the national car shortage and the Oregon car shortage here alleged to be discriminatory because of the intervening discretionary control over the distribution of cars on a system basis exercised by the Southern Pacific Company. We do not dispute the fact that a national shortage of cars existed. Our point is that this record does not justify a conclusion that this condition caused or in any way directly influenced the internal system car distribution practices of Southern Pacific Company. The issue of discrimination aims at what Southern Pacific did with such cars as it had available for distribution, not at how many cars it provided for service on its system, whether the total number was adequate or not.

Finding No. 2 suggests in substance that the Oregon

car shortages resulted from an unprecedented expansion of the lumber industry at a time when Southern Pacific was striving to bring its facilities up to standard after years of depression and war. The same criticism as above indicated is applicable here, namely, there is no relationship between Southern Pacific's over-all system shortage of cars and facilities and the method by which such cars and facilities which are available are distributed or allocated. We are concerned here with whether Southern Pacific practiced unjust discrimination in the allocation of cars available to it, not with whether considered as a whole inadequate facilities were available generally. This finding will not support the ultimate conclusions relating to discrimination.

Finding No. 3 is closely inter-related with Finding No. 2 and is subject to the same comment. Southern Pacific indisputably made heavy investments in equipment and facilities during the period involved, comparatively greater outlays than the nation's railroads as a whole. But this will not support a rational conclusion that the facilities and cars produced by the expenditures were distributed on a non-discriminatory basis or that a fair and equitable proportion of such expenditures and cars were allocated to Oregon. One might just as well conclude that as long as Southern Pacific expended funds at a rate greater than the average of the other railroads serving the nation, that it could not be guilty of discrimination between its various service areas while so doing. The non sequitur is transparent.

Finding No. 4 does nothing more than re-state the problem without suggesting an answer. Concededly Oregon is a deficit state and concededly this condition existed long prior to 1950. If there had been no shortages prior to 1950, the facts of record logically might have justified affording Southern Pacific a reasonable time

within which to adjust to the demand. But would this be justification for shortages which continued unabated for months while Southern Pacific had a system surplus? Would such be an adequate excuse for stifling discriminations found to exist five years after the condition first was detected? (*Pennsylvania R. Co. v. Sonman S. C. Co.*, 242 U.S. 120, 127). That Oregon is a deficit state might well indicate reluctance on the part of the Southern Pacific Company to deadhead adequate cars into the state and might support the conclusion that the shipping demands of the lumber industry create uneconomic conditions in the return of cars, but it cannot form a rational basis for the conclusion that what Southern Pacific did with those cars it had available was non-discriminatory as to Oregon shippers in relation to other shippers on Southern Pacific's lines. No amount of sophistication in terming these findings of the Commission to be discretionary, presumptively reasonable, or peculiarly relating to the Commission's expertise will gainsay the fact that elementary rules of logic have been violated and arbitrary conclusions stated. If the conclusion is capricious it matters not whether it be discretionary, presumptively reasonable or the product of expert judgment. Illogic is illogic, no matter what its dress.

The same may be said with equal force with regard to Finding No. 5. It may be admitted that Southern Pacific had difficulty in meeting the demands of its system for cars by reason of the distribution rules established by the Association of American Railroads. The fact is that even operating under these car distribution rules Southern Pacific continued to show an average system surplus of cars during most of the time relevant hereto and, despite turning over cars to other lines, was left with an average number of cars on its lines in excess of ownership. (p. 19). Nothing in this, however, will

support or even suggest the conclusion that what Southern Pacific did with such cars as it had available was equitable and non-discriminatory as to Oregon shippers.

In concluding this portion of our brief, we repeat that the discrimination issue cannot properly be resolved by findings that a national car shortage existed, that unprecedented expansions in the lumber industry occasioned a heavy demand for cars, that Southern Pacific's general system-wide equipment and facilities expenditures were commendably heavier than those of the nation's railroads as a whole, that fewer cars return to Oregon loaded than leave the state loaded, that Southern Pacific was operating under A.A.R. rules relating to the distribution of cars. The issue is whether Southern Pacific Company distributed the cars it had available on an equitable and non-discriminatory basis as to Oregon shippers. In resolving this issue, the above findings are relevant only to the extent that they may be shown to have had a rational causal connection with the actual car distribution practices engaged in by Southern Pacific. We submit that no such connection exists, that such a connection is essential to the validity of the order, and that the order, for want thereof, is arbitrary and capricious. *Interstate Commerce Comm. v. Louisville & N.R. Co.*, 227 U.S. 88, 91.

The Basis for the Commission's Conclusion as Stated by the Commission

As is apparent, none of the foregoing findings will sustain the conclusions reached by the Commission. Indeed, the Commission itself did not rest its order solely thereon. Apparently the Commission intended to rest the order also on the following language:

> ". . . there is no convincing evidence that, on the whole, the complainant's members did not fare

as well in the car service accorded them as did shippers generally in car-shortage areas elsewhere," (p. 35, 36).

This statement is a transparent evasion of the issue, is wholly arbitrary and inconsistent with earlier findings made. It was not incumbent upon complainants to demonstrate discrimination in comparison with the nation at large but only that discrimination had been practiced by defendant Southern Pacific Company in its treatment of Oregon shippers in relation to other areas *on its lines*. The record clearly establishes that Oregon over a long period of time bore not only the entire brunt of the shortage in cars existing on Southern Pacific's lines but during most of the time indeed was severely short of cars during periods when the remainder of the Southern Pacific Company's system had *an excess of cars*. On this point see *United States v. Berwind-White Coal Mining Company*, 274 U.S. 564, 583.

Commission's Findings of Fact Based on Evidence Beyond the Record

We direct the Court's attention to two additional findings which appear in the Commission's report. The Commission found:

1. Improved car distribution should result from compliance with the order of the Oregon Commissioner, *effective June 27, 1953*, which "may reasonably be expected to insure . . . . equitable car distribution to the complainant's members in the future." (p. 36, Emphasis supplied.)
2. Installation of centralized traffic control between Eugene and Crescent Lake was "in progress at the time of oral argument herein." (p. 31).

These matters were brought to the attention of the Commission by Southern Pacific outside the record. The

Commission, nevertheless, has included them in its order and it is apparent that the order in important respects rests upon these recitals of fact. We suggest to the Court that if what has been said before in this brief is not adequate to persuade the Court to note probable jurisdiction, that this element in the case is sufficient justification therefor by reason of the patent prostitution therein not only of the Administrative Procedures Act but of elementary concepts of due process and fair play.

The Controversy is not Moot

The preceding portion of this brief is a sufficient answer to the Motion of the Commission and the United States. Southern Pacific raises one additional point by erroneously advising this Court that the District Court "concluded that the controversy before it was moot". (Southern Pacific Motion pp. 18 and 21).

In fact, the only issue found to be moot by the District Court was with respect to facts arising after the record in the case was closed, which facts were injected by Southern Pacific and not by appellant.

By a motion directed to the District Court, Southern Pacific erected a windmill at which to tilt.

Appellant's petition to the District Court for an injunction against the Order of the Commission attacked numerous deficiencies in that order for failure to find that Southern Pacific had violated the law and discriminated against Western Oregon shippers in the matter of cars, facilities, interchange arrangements, and adequate personnel—all, of course, pertaining to the complaint period and based upon evidence in the record. A prayer to the Commission that Southern Pacific be enjoined from continuing its discriminatory practices was clearly proper. Yet, it was upon this point which Southern Pacific raised the issue of mootness before the District

Court. Summary judgment was moved for upon the following grounds:

> "1. The denial by the Commission of reparations cannot be reviewed by this three judge court and the only issue before this Court is whether petitioners, on the record made in 1951 and 1952, are entitled to relief for the future. The requested relief for the future is predicated upon the alleged inadequacy and discrimination in transportation service asserted to exist in 1951 and 1952. The affidavit of W. D. Lamprecht, General Manager of Southern Pacific Company (Exhibit "A" of intervening defendant's memorandum of points and authorities) shows that the facts existing at the time the record was made before the Commission in 1951 and 1952 have materially changed. The issues presented by the record concerning future relief have been rendered moot by these changes in the operation of Southern Pacific Company. No justiciable controversy is here presented." (Motion of Intervening defendant Southern Pacific Company, pp 2, 3, a part of the transcript on this appeal).

Bluntly, what Southern Pacific tried to do before the District Court was to present, by way of affidavit, facts arising after the complaint period to show that many improvements in service to Western Oregon had been inaugurated, and that Southern Pacific, voluntarily, had provided much of the relief for which appellant had sought (and been denied) a Commission Order. The list of improvements in service to Western Oregon presented to the District Court, arising after the complaint period. was imposing, and is indicative that Southern Pacific was more impressed by the case made before the Commission than was the Commission itself.

Southern Pacific, again by its motion to affirm directed to this Court, offers the advice:

> "That substantially all of what was sought by the

1950 complaint has, in the course of progress over the intervening years, been accomplished." (p. 21)

This is another instance of the exasperating practice indulged in by Southern Pacific of bringing the Commission and courts "up to date" and attempting to influence the decision by matters dehors the record.

The District Court held that in determining whether or not the Findings and Order of the Commission should be upheld:

> "We must look to the record made before the Examiner for the Commission in the light of the facts existing prior to September 26th, 1952." (District Court Opinion, p. 11, Statement of Jurisdiction).

All this appellant ever sought before the Commission or the District Court was an appropriate Order based upon the facts of record. We think it is well established that intervener's argument of mootness based upon subsequent improvements in service is wholly irrelevant. *Southern P. Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498; *United States v. Trans-Missouri Freight Asso.*, 166 U.S. 290, 308; *Panama Refining Co. v. Ryan*, 293 U.S. 388; *Federal Trade Com. v. Goodyear Tire & R. Co.*, 304 U.S. 257; *Walling v. Reuter, Inc.*, 321 U.S. 671; *Ford Motor Co. v. United States*, 335 U.S. 303; *Yarnell v. Hillsboro Packing Co.*, (C.C.A. 5, 1934) 70 F(2d) 435, 438; *Walling v. Haile Gold Mines* (C.C.A. 4, 1943) 136 F(2d) 102, 105.

The leading case is *Southern P. Terminal Co. v. Interstate Commerce Commission*, cited first above, but perhaps the best concise statement occurs in the last cited Circuit Court decision, *Walling v. Haile Gold Mines*, 136 F(2d) 102, at page 105:

> "It is familiar law that the discontinuance of an illegal practice by defendant (either by going out of

business or otherwise) after the institution of legal proceedings against the defendant by a public agency, does not render the controversy moot. (Citing Cases). This particularly is true where the challenged practices are capable of repetition. (Citing Cases). Nor is a case rendered moot where there is a need for the determination of a question of law to serve as a guide for the public agency which may be called upon to act again in the same matter."

To use a rather homely illustration, and one which we think is justified by our own factual situation, assume that Doe seeks an injunction against Roe, an adjoining land owner, from draining his sewage onto Doe's land. Roe answers denying the fact of drainage and the trial court finds for Roe on the facts—there is no sewage drainage. Doe appeals, and before the case is heard by the Appellate Court, Roe digs a ditch and diverts the sewage so it no longer drains on Doe's land. Roe then responds to the appeal by arguing (1) the lower court was right on the facts—I didn't do it, and (2) since the lower court's decision I have constructed a drainage ditch so the sewage does not drain that way any more, so there is nothing for the court to decide—the issue is moot.

Assuming that this is a true Appellate Court, it appears that Roe should not be permitted to bring in new facts upon the appeal. Further, it is just possible that Doe may want his injunction anyhow, to have his rights determined, rather than having to depend upon the continued good faith of Roe, who still maintains that he did nothing wrong in the first place.

As shown by the Commission's Report and Order, Southern Pacific service to Western Oregon was such as to work considerable economic hardship on a great many industries recurrently over a period of some 7 years,

from 1946 through 1952. The Report also shows that despite strenuous efforts, some directed to the Commission itself, by the affected industries, the situation worsened rather than improved until this complaint was brought. More than a matter of principle is involved. Appellant is not hesitant to commend Southern Pacific for substantial improvement in its service to Western Oregon since the proceeding was terminated before the Commission. Whether the improvements satisfy the complaint of appellant was an issue raised by Southern Pacific and rejected by the District Court. It is not an issue before this Court. The only issue is the sufficiency of the facts found by the Commission to sustain its Order. If the Order is legally wrong it should be set aside. Shippers are entitled to have their rights determined by the Interstate Commerce Commission and not by the whim of the carrier.

The Interstate Commerce Commission is more than a nominal defendant in this proceeding. In a very real sense appellant's complaint to the District Court was directed at what the appellant believes is an unconscionable abdication of its statutory duties by the Commission.

As shown by the Commission's Report, several witnesses for the appellant gave strong testimony that no permanent solution to the rail transportation problem in Western Oregon would ever be arrived at until the Portland gateway is opened to substantial lumber traffic during periods of car shortage, thus making available transcontinental roads of the more northerly carriers and eliminating to some extent the necessity of bringing empty cars from distant southern points when shortages develop. (Appendix to Commission's Motion, p. 18). Of course it is not the function of this Court to direct the opening of the Portland gateway in times of car shortages, or to direct any other specific solution, but appel-

lant may yet hope that once the Commission is required to assume and give meaning to the duties enjoined by the Interstate Commerce Act, relief will be afforded, even beyond that voluntarily provided by Southern Pacific since the record of this case was closed.

There is one other reason that this controversy is not moot. The damage claim of Wren, the only member of the appellant which filed such a claim, is pending in District Court. The damages in that proceeding are alleged to arise both from the general discrimination which Wren suffered along with many other shippers, and from discrimination peculiar to the Wren operation. No one supposes that the District Court, relying upon the identical record, is going to make a separate determination upon the issue of general discrimination. The District Court will be governed by the decision of this Court in that respect.

CONCLUSION

For the foregoing reasons, we respectfully submit that substantial questions are presented by this appeal and probable jurisdiction should be noted.

Respectfully submitted,

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